

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2017

Public Authority: Telford and Wrekin Clinical Commissioning Group

Address: Halesfield 6
Telford
Shropshire
TF7 4BF

Decision (including any steps ordered)

1. The complainant made a number of freedom of information requests to the Telford and Wrekin Clinical Commissioning Group ("the CCG") for information regarding Gender Reassignment Surgery. The CCG initially said that the requested information was not held and told the complainant to redirect their request to NHS England. However, during the course of the Commissioner's investigation it identified some further information and disclosed this to the complainant.
2. The Commissioner's decision is that the CCG breached section 10 in its handling of the complainant's request but she is satisfied that it has now disclosed all of the information it holds and so she requires no steps to be taken.

Request and response

3. The complaint relates to two freedom of information requests which the complainant submitted to the CCG on 2 March 2017 and which read as follows:
 1. *Does the former Telford and Wrekin PCT and now Telford and Wrekin CCG have a national NHS policy for transgender patients, accessing its services? If so, please let me know where I can find it.*

2. *Is the policy following NHS England Guidance or is the policy of its own determination on transgender health care and gender reassignment surgery?*
3. *What is the Providers List for Gender Reassignment Surgery?*
4. *What is the remit of your surgery once a surgical core procedure commences along the pathway for transgender surgery? Please be very clear about this and how it follows the pathway in the policy guidance as per 1, 2 and 3.*
5. *What happens when the surgery is incomplete or botched? Please be very clearly about this and does the patient have a right of choice of treatment if the Gender Reassignment Surgery is failed or botched? Does the patient have a right of choice, where they have their GRS surgery or their corrective surgery and if not why not?*
6. *In relation to 1 – 5, can the patient choose private or NHS for their Gender Reassignment Surgery or corrective Gender Reassignment Surgery irrespective of whether the GRS surgeon is on the providers list? Can the patient choose the GRS surgeon not on the providers list?*
7. *Please explain why other NHS CCGs, NHS PCTs and NHS Trusts across the United Kingdom can choose where they have their GRS surgery but Telford refuse the right of choice on this for their patients, who are not on the providers list.*

and the second request:

1. *How many patients have had Gender Reassignment Surgery with the former T&WPCT and now T&WCCG to date?*
2. *How many complaints about Gender Reassignment Surgery have the CCG had?*
3. *How many patients are satisfied with their GRS surgery and how many are not?*
4. *How many patients have had to have corrective GRS on the continued care pathway for their treatment and have they had a choice on the matter which surgeon they have had either private, irrespective of whether the surgeon is on the providers list on the NHS or on the NHS directly?*

5. *Are all patients allowed to have the right of choice of their surgeon if their operation is failed by the NHS, irrespective of whether the surgeon is on the providers list?*
4. On 3 March 2017 the Midlands and Lancashire Commissioning Support Unit (CSU) responded to both requests on behalf of the CCG. It explained that the CCG did not fund Gender Reassignment Surgery and that therefore the complainant may wish to redirect their request to NHS England. It later said that the information was not held by the CCG because Gender Reassignment is commissioned via NHS England and so they would be best placed to answer the requests.

Scope of the case

5. On 3 March 2017 the complainant contacted the Commissioner to complain about the CCG's handling of the request.
6. The Commissioner agreed that the scope of her investigation would be to consider whether the CCG is correct when it says it does not hold the information the complainant requested. The Commissioner has also considered whether the CCG breached the Act in the time it took to respond to the requests.

Reasons for decision

Section 1 – information not held

7. During the course of her investigation the Commissioner contacted the CCG to remind it of its responsibilities and encouraged it to reconsider its handling of the complainant's request. As a result it provided the complainant with a series of revised responses which the Commissioner has detailed below.
8. On 21 March 2017 the complainant sent a further response to the complainant which provided the following information for the first request, using the same numbering as the complainant's questions:
 1. It referred the complainant to the NHS England Interim Gender Dysphoria Protocol and Service Guideline 2013/2014 - <https://www.england.nhs.uk/wp-content/uploads/2013/10/int-gend-proto.pdf>
 2. It confirmed that this was an NHS England Policy.

3. It said that NHS England holds the providers list as this comes under Specialised Commissioning.
 4. The CCG said that it had no remit such as the complainant described because transgender surgery comes under Specialised Commissioning.
 5. The CCG referred the complainant to page 8, paragraphs 10 and 14 of the NHS England Interim policy referred to above.
 6. For this part the CCG explained that the patient did not have a choice over a surgery and reiterated that this was an NHS England Commissioned Service.
 7. The CCG again explained that CCGs do not commission Gender Reassignment Surgery.
9. On 17 March 2017 the CCG sent a further response to the complainant which confirmed that it held no information in respect of the second request because, it said, NHS England were the lead commissioners for Gender Reassignment Surgery.
10. On 25 April 2017 the CCG sent a further response to the complainant. For the first request it essentially repeated its earlier response but for question 6 it clarified that patients can choose NHS approved providers only for Gender Reassignment Surgery. It again referred the complainant to the NHS England Interim Gender Dysphoria Protocol and Service Guideline 2013/2014.
11. For the second request the CCG now issued a new response, addressing each of the questions as below.
1. It now explained that between 23/08/2004 and 22/11/2012, 25 requests for Gender Reassignment Surgery were approved. It said that the CCG had not approved any requests as the responsibility for GRS moved to NHS England in 2013 (When CCGs were established to replace Primary Care Trusts (PCT's)).
 2. For this part it confirmed that one individual had complained about surgery that was carried out when the PCT was the responsible Commissioner.
 3. It said that it did not hold information on how many patients were or were not satisfied with their Gender Reassignment Surgery.
 4. It said that it was not aware of any patients requiring corrective surgery when the Primary Care Trust was the responsible Commissioner and that the CCG does not hold information on patients requiring corrective surgery under NHS England's commissioning arrangements.
 5. For this part it confirmed that NHS England and CCGs only commission treatment from NHS approved providers.

12. Despite the CCG reconsidering the requests and disclosing some further information, the complainant continues to believe that the CCG holds further information falling within the scope of the request. This appears to be based on the belief that the CCG does indeed fund Gender Reassignment Surgery and/or corrective Gender Reassignment Surgery.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. It is unclear exactly which parts of the requests the complainant believes further information is held. Nevertheless the Commissioner asked the CCG to explain what steps it had taken to locate the information falling within the scope of the complainant's request and asked it to respond to some specific points made by the complainant.
15. For the first set of requests the CCG has answered the complainant's questions by referring them to the appropriate guidance, explaining its role and confirming that Gender Reassignment Surgery is a NHS England commissioned service. It said that the questions in this request related to specific policy and procedure which it was already aware of and so didn't require any specific searches to locate this information.
16. The second request has asked a number of questions about the number of patients who had had Gender Reassignment Surgery, patient satisfaction and complaints received. The CCG outlined to the Commissioner the steps it had taken to search for the information in each question.
17. For the first question the CCG confirmed that a search was made on the Individual Funding Request (IFR) database which it said contains details of all patients coming through the IFR process since 2003. It explained that the database had been filtered on the "procedure" and the following terms had been selected to ensure all relevant detail was captured: -

Gender Dysphoria, Gender Dysphoria Clitoral Hood formation, Gender Dysphoria F-M, Gender Dysphoria M-F, Gender Dysphoria counselling, Gender Reassignment, Hair removal – Gender Dysphoria, laser – hair removal – Gender & Speech and Language – Gender Dysphoria.

18. The complainant's request had specifically asked for information on Gender Reassignment Surgery of which its search found 25 patients had been approved through the IFR process. The CCG now clarified that this does not necessarily mean that they had actually received or completed the surgery. The last approval was dated November 2012 and it explained that since April 2013 Primary Care Trusts were succeeded by other NHS bodies and the responsibility for Gender Reassignment Surgery now fell within specialised services which was run by NHS England. Therefore it said that any requests received by the CCG after this date will have been forwarded to NHS England.
19. For the second question, regarding the number of complaints about Gender Reassignment Surgery, the CCG explained that it holds all complaints information on its "Datix system", and that these complaints are from January 2013 onwards. It said that it did not hold a database for complaints made prior to this although it had found that there were some paper records in archiving which it said it had gone through manually. It also said that there may be additional paper records which it no longer holds because, it explained, when the CCG came into force, PCT records were transferred to NHS England.
20. The CCG has demonstrated that it has carried out a comprehensive search of the Datix database using all possible search terms. It has also visually checked each individual complaint record on the Datix system recorded since January 2013. Having completed all of these searches it confirmed that there has only been one person who has made a complaint about Gender Reassignment Surgery.
21. The third question was similar in that it asked for the number of people who were satisfied with their Gender Reassignment Surgery. Again the CCG confirmed that only one patient had contacted its Patient Services Team on this subject although patients may have contacted providers directly. It said that the CCG would not have been made aware of this and therefore would not hold this information. The one patient was identified via the Datix system.
22. For question four the CCG said that it was unaware of any Telford and Wrekin patients having corrective Gender Reassignment Surgery although it was aware of one patient who had requested corrective surgery, which was identified through a search of its complaints database. It explained that unless a patient has been discharged from Gender Dysphoria Services, the responsibility for corrective surgery would sit with NHS England and therefore NHS England may hold information relevant to this part of the request.

23. The CCG also explained that CCGs do not routinely procure Gender Reassignment Surgery as the responsibility for this transferred to NHS England in 2013. It said that if for any reason the CCG became responsible for procuring Gender Reassignment Surgery in respect of a specific individual the CCG would approach NHS England to obtain their guidance, given that they specialise in this area. The CCG also confirmed that, in line with the Department of Health's *Any Qualified Provider* Guidance, it could only commission such surgery from an organisation that holds a current NHS contract.
24. For the fifth question the CCG reiterated the point made above, that CCGs do not routinely procure Gender Reassignment Surgery but that if for any reason the CCG became responsible for procuring Gender Reassignment Surgery in respect of a specific individual, it would approach NHS England to obtain their guidance. Again, it confirmed that it could only commission such surgery from an organisation that holds a current NHS contract.
25. The Commissioner has considered the CCG's account and is satisfied that it has now disclosed all of the information it holds falling within the scope of the complainant's requests. As the Commissioner mentioned above, the complainant has not said exactly which parts of the requests they believe have not been answered satisfactorily. However, the Commissioner accepts that the CCG has taken reasonable steps to search for the information, particularly regarding the second request, searching both manual and electronic records, including archived files. Where recorded information has been recovered it has been disclosed to the complainant. Where the CCG does not hold recorded information it has attempted to answer the complainant's queries as best it can whilst explaining that Gender Reassignment Surgery, which is the focus of the complainant's requests, is funded by NHS England.
26. As regards the first request the CCG has referred the complainant to the relevant policy and answered their further questions by referring to relevant passages within the guidance. It explained that patients can only choose NHS providers for Gender Reassignment Surgery and, once again, confirmed that CCGs do not commission Gender Reassignment Surgery.
27. As the Commissioner understands it, the complainant is concerned about who has responsibility for funding Gender Reassignment Surgery and corrective Gender Reassignment Surgery and it is this which is the focus of their complaint. Obviously this is not something for the Commissioner to determine. However, the complainant did provide evidence which suggested that a patient could receive corrective Gender Reassignment Surgery through the CCG via a process known as an

individual funding request. This is where a patient can, depending on their circumstances, be offered a treatment or service that is not normally offered by the NHS. In light of this the complainant suggested that this undermined the CCG's position that it does not offer Gender Reassignment Surgery and that NHS England commissions these treatments, which underpinned much of its response to the complainant's requests.

28. The Commissioner had asked the CCG to comment on this point and in response the CCG clearly explained why this was not the case, refuting the complainant's suggestion. The CCG explained that it had previously received some incorrect advice from NHS England which suggested that the CCG might be responsible for any further surgical interventions following Gender Reassignment Surgery. It appears that this may have added to the confusion around this case. However, the CCG has now established that this is not correct. Both the CCG and NHS England have stated categorically that the CCG does not commission Gender Reassignment Surgery.
29. Crucially, the CCG also referred to NHS England's "*Manual for Prescribed Specialised Services 2016/17*" which confirmed that Gender Reassignment Surgery and any corrective surgery are solely the responsibility of NHS England and not CCGs.

What NHS England commissions

NHS England commissions gender identity disorder services from Specialist Gender Identity Disorder Clinic Centres. This includes specialist assessment, non-surgical care packages, transgender surgery and associated aftercare.

30. The complainant has also referred to a "Policy for Gender Dysphoria for NHS Patients in Shropshire and Telford and Wrekin" as evidence that the CCG has responsibility for providing these services and so must hold further information related to the request. However the CCG has confirmed that this is a policy which was held by Shropshire County and Telford and Wrekin PCT, rather than the CCG and is no longer in use. The CCG confirmed that the policy was not obtained through the CCG's website.
31. In the Commissioner's view, there seems to be some confusion on the complainant's part about the extent of the information the CCG holds and part of this seems to arise from the fact that PCTs prior to their being disbanded, had responsibility for Gender Reassignment Surgery. The complainant appears to see CCGs as essentially the same organisations. Whilst it is correct that when CCGs were created they took on many of the responsibilities of the former PCTs, they are

nevertheless distinct organisations with a separate legal identity and on their creation responsibility for Gender Reassignment Surgery passed to NHS England.

32. The Commissioner has decided that the CCG has now disclosed all of the information falling within the scope of the complainant's requests. It has been unable to respond to some of the requests to the complainant's satisfaction because it does not have responsibility for funding Gender Reassignment Surgery. The Commissioner is satisfied with the CCG's explanation that this is the responsibility of NHS England and nothing she has seen would lead her to conclude that the CCG holds further recorded information. In the absence of any evidence to the contrary the Commissioner must find that, on the balance of probabilities, no further information is held and therefore she requires no further action to be taken.

Section 10 – time for compliance

33. Section 1(1) of FOIA provides that:

(1)(1) Any person making a request for information to a public authority is entitled to-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

34. Section 10(1) of FOIA provides that:

10(1) subject to subsection (2) and (3), a public authority must comply with section 1 promptly and in any event not later than the twentieth working day following the date of receipt.

35. In this case the complainant made their request to the CCG on 2 March 2017. Initially the CCG failed to respond properly and instead referred the complainant to NHS England. It was only during the course of the Commissioner's investigation that it reconsidered the request and found that it did hold some further information. In fact it took several approaches from the Commissioner before the CCG finalised its position and disclosed all of the information it held. Clearly, the CCG was too ready to refer the complainant to NHS England when it was clear that it did in fact hold some information falling within the scope of the request.
36. The Commissioner has found that the CCG breached section 10(1) in its handling of the complainant's request by failing to respond within 20 working days.

Right of appeal

37. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Paul Warbrick
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